Filed 12/13/16 P. v. Senatore CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. PASQUALE PATRICK SENATORE, Defendant and Appellant.	C074553 (Super. Ct. No. P02CRF0235)

Defendant Pasquale Patrick Senatore appeals following conviction on multiple counts of sex offenses against two minors. (Pen. Code, §§ 288, subds. (a), (c) [lewd acts], 261, subd. (a)(2) [forcible rape]; unless otherwise set forth, statutory references that follow are to the Penal Code.) Defendant contends the trial court erred by excluding evidence to corroborate his testimony that he maintained a "low profile" when he moved to New York, not to avoid arrest on the California charges, but to avoid retribution from mobsters who bore a grudge against defendant's father. Defendant also contends the trial court erred by imposing more than one indeterminate term per victim based on the multiple-victim strike circumstance under section 667.61, and by imposing an excessive fine under section 290.3. We modify the judgment to reduce the fine to $200. We otherwise affirm the judgment.

FACTS AND PROCEEDINGS

In 1991, defendant moved in with girlfriend Lisa and her eight-year-old daughter, victim Jane Doe I, who viewed defendant as a father figure. In 1992, victim Jane Doe II was born to Lisa and defendant.

One night in January 1997, with Lisa out of the house, defendant (then age 30) followed Doe I (then age 13) into her bedroom, pushed her onto the bed and kissed her on the mouth, trying to use his tongue (Count 1, § 288, subd. (a), lewd act on a child under 14). Doe I panicked and tried to push him off. He left the room. Doe I stopped calling defendant "daddy" for a while. A month later, at a friend's urging, Doe I related the incident to her mother, who did not believe it.

In early July 1998, defendant and Doe I, then age 14, spent the night alone. They watched a scary movie in his bedroom. She went to sleep but awoke to defendant rubbing her back. He rolled her over, tried to pull off her pants, got on top of her, and tried to insert his penis in her (Count 2, § 288, subd. (c), lewd act on 14-year-old). She felt his erect penis touching her vagina, but it did not penetrate. He kissed her on the mouth. She got away and locked herself in the bathroom.

The next day, defendant pushed Doe I onto the bed, spread her legs, and had sexual intercourse with her, over her protests (Count 3, § 261(a)(2), forcible rape).

The jury also heard evidence of uncharged acts. About a dozen times during the next few months, defendant had intercourse or masturbated on Doe I's body. Some incidents occurred in private homes when defendant brought Doe I to help him in his job as a house painter, and no homeowner was present. On three occasions defendant took Doe I to a hotel where he committed sexual acts. She kept a hotel brochure, a receipt for perfume he bought her, and a note he wrote to her stating, "I promise that it will be the last time."

Defendant then turned to his own biological daughter, Doe II, when she was five years old. Counts 4 through 10 were for lewd acts upon Doe II, a child under age 14 (§ 288, subd. (a)). On multiple occasions, beginning when she was five years old, defendant took a shower with her, touched her vaginal area, masturbated, and tried to get her to touch his erect penis, telling her it would be fun. On the last occasion, in July 1998, defendant made Doe II touch his penis. She screamed and said she would tell her mother, but she did not tell her mother.

In 2000, Doe I got into an argument with her mother, revealed the sexual misconduct by defendant, and showed her mother the hotel brochure, perfume receipt, and defendant's note promising it would be the last time. Still, the victim's mother did nothing.

In November 2001, Doe I revealed the abuse to a school counselor, who reported it to law enforcement.

Sheriff's detectives in plainclothes and an unmarked car went to defendant's home on January 30, 2002, but no one answered the door, so they left a business card and note asking him to call. He did not call. One of the detectives returned two weeks later. The card was gone. There were cars in the driveway and noise inside the house, but no one answered the door. A few days later, a person identifying himself as defendant called the detective in response to the card. The detective said he wanted to speak with defendant about a 1998 case in which defendant was named as a witness. They arranged to meet on March 5, 2002, but defendant called and cancelled, saying he was out of town. Defendant did not return subsequent calls.

At 9:00 a.m. on May 3, 2002, detectives knocked on defendant's door and heard barking dogs and movement inside the house. Lisa eventually answered the door and told them to wait there while she secured the dogs. When she returned minutes later, the detectives asked for defendant. Lisa said he was in the bedroom getting dressed. She went to get him, then returned and said the sliding glass door was open and he had run

out the back. The detectives verified defendant was not in the house or backyard. The dogs' attention was focused on the back fence. When Lisa later saw defendant, his foot was broken and purple. When an investigator later came to photograph the fence, Lisa told him that defendant broke the fence jumping over it. At trial, Lisa said defendant told her he broke his foot jumping over the fence.

A criminal complaint was filed the same day, May 3, 2002, and detectives obtained an arrest warrant. Defendant hid out in Woodland for awhile. Lisa saw him a few times. According to her, he said he was trying to hire an attorney in Sacramento. Defendant later told Lisa he was going to New York to try to get the deed to his sister Patricia Boutsikakis's house to raise money for the $250,000 bail. He said he had a bus ticket from Reno to New York, so Lisa drove him to Reno. Lisa later went to New York, supposedly to get the deed to give to an attorney, though there was evidence she had other plans. Lisa took her son and Doe II to New York with her and stayed with Patricia and defendant's mother for two weeks. Patricia would not provide the deed. Defendant spent time with Lisa while she was in New York. Doe II had not known defendant would be in New York and avoided contact with him. When Lisa and her children left, defendant said he would return to California in three weeks to take care of the matter, but he did not return.

In New York, defendant worked for Gary Crouse's painting business from 2001 until 2011, when defendant was arrested. Crouse testified he paid defendant in cash because defendant did not have identification to cash checks. Because defendant did not drive, Crouse drove him to jobs. For the last couple of years, Crouse picked up defendant at the home of "Carol," where it appeared defendant was living. Defendant regularly read The New York Blotter's report of persons whom police were seeking.

In October 2011, a United States Marshal began searching for defendant. He learned that while defendant was in New York, he did not have a New York driver's license, did not rent or own real property, and did not receive any government assistance.

On October 31, 2011, the Marshal met with defendant's sister Patricia, who said she did not know where defendant was and had no way to contact him. The agents contacted another sister, Darnel Reyes, who said the same thing. That same day, defendant received a phone call while at work with Crouse. The call upset defendant. The next day, defendant had Carol bring him to the job site. Defendant asked Crouse for a ride to New Jersey and for Crouse to use his license to check defendant into a motel. Defendant told Crouse he needed a place to stay for a while after arguing with Carol's landlord about defendant's sisters causing a scene by coming to the house and arguing with Carol. Crouse used his driver's license to rent a New Jersey motel room for defendant. Defendant then missed work for a couple of weeks, saying he was sick. Crouse later filled out paperwork so defendant could move to a studio apartment adjacent to and owned by the motel.

After interviewing Carol, the Marshal on December 12, 2011, followed Crouse to the motel and saw defendant enter Crouse's van. The Marshal followed the van to a McDonald's, where it stopped, and the Marshal arrested defendant. Defendant did not have any identification with him.

Sheriff's detectives learned defendant had been living at the motel under the name Patrick Sorrentino.

Defendant testified at trial. He had a 1999 conviction for welfare fraud. He denied all alleged misconduct and accused the victims of lying. In California, he agreed to meet with the law enforcement officers who said it was about his being witness to an accident, but he did not meet because he was busy and was planning on moving to New York, where his mother and sisters live and he used to live, because there was no work here. He denied being present when law enforcement officers knocked on his door on May 3, 2002, and he denied running out the back. He claimed he left for New York two days earlier.

Defendant said he tried to obtain a New York driver's license but could not, due to a license suspension in California. He believed he obtained a New York I.D. card but was not certain and did not have one "recently." He tried to open a checking account but was denied because he had bank accounts closed for insufficient funds and overdraft, had a car repossessed, and had bad credit. He did not rent an apartment because he stayed with relatives and friends. Lisa visited defendant in New York. She and the children were supposed to move to New York eventually, but a few years later she met someone new and stayed in California.

Defendant moved to the motel after a fight with Carol, with whom he had been living. Crouse filled out the registration because the motel owner demanded a New Jersey driver's license. Defendant denied using the name Sorrentino.

Defendant kept a low profile in New York, not because of the California matter, but because he was afraid of the Mafia in New York. Defendant's parents divorced when he was eight. His father remarried and then got involved with organized crime. Ten years later, defendant's father testified in high-profile trials, including against John Gotti, sent multiple mobsters to prison, entered a witness protection program, and relocated to Utah. Defendant's uncle later followed suit, testifying against mobsters, and relocating to Sacramento under the witness protection program. Defendant moved from Brooklyn to Sacramento in 1990. When defendant returned to New York, he went to Staten Island, not Brooklyn, and lived a quiet life.

Defendant's sisters, Patricia Boutsikakis and Darnel Reyes, testified in his behalf. They denied knowing anything about the California criminal case.

The jury found defendant guilty on all counts and found true special allegations that he has been convicted in this case of committing offenses against more than one victim (§ 667.61).

The trial court sentenced defendant to 138 years to life in prison: Three years on Count 2 as the principal Count and consecutive terms of 15 years to life on each of the

other nine Counts. The court ordered defendant to pay various fines and fees, including a $300 sex offender fine (§ 290.3) not listed in the abstract of judgment.

DISCUSSION

I

Exclusion of Evidence

Defendant claims the trial court denied his right to present a defense by excluding proffered testimony from his sisters about the family's mob connections, to corroborate defendant's testimony that he maintained a low profile in New York to avoid Mafia retribution, not to avoid the California charges.

Defense counsel stated defendant would testify he lived "off the grid" in New York because he feared the Mafia would seek retribution, and the defense asked for an Evidence Code section 402 hearing on an offer of proof that defendant's sisters "would essentially testify that, yes, they were raised in a crime family. Yes, their uncle and their father testified against Mr. Gotti. Yes, they were placed in witness protection. They can even tell you how they were transported to go meet with their father by the FBI, you know, in out-of-the-way places, that type of thing." Defense counsel said he initially thought the evidence would be admissible under the "family history" hearsay exception (Evid. Code, § 1310-1316) but realized that exception did not apply. So he offered the evidence for a non-hearsay purpose, to corroborate defendant's belief that his father was in trouble with the mob.

The prosecutor argued the sisters' testimony about their father's involvement would be hearsay, and their uncommunicated beliefs were irrelevant, and their state of mind could not corroborate defendant's state of mind.

The court asked, "the sister's testimony that the father was involved with the mob is based on what?" Defense counsel said, "Their father telling them that." And "[i]t was also in the newspaper and books. It was a big thing back in New York." Defense

counsel said the sisters would testify they were afraid but not as afraid as defendant because the sisters were married and had different surnames.

The trial court said its inclination was that the sisters' state of mind as to what took place was second-degree hearsay. Defendant could testify that his family testified against the mob to explain his asserted state of mind as to why he kept a low profile in New York, but it did not appear the prosecutor was going to offer any evidence that defendant's family did not testify against the mob, and therefore the sisters' testimony was inadmissible. The trial court ruled the sisters' testimony inadmissible to support defendant's state of mind because it would be offered for the truth of the matter that his father and uncle were involved with organized crime and testified against the mob.

Defendant argues the question is whether the proffered evidence was hearsay, which is a question of law subject to de novo review. But defendant cites *People v. Cromer* (2001) 24 Cal.4th 889, 894, which merely said questions of law are reviewed de novo. A trial court has broad discretion in deciding the admissibility of all evidence, including hearsay evidence. (*People v. Beeler* (1995) 9 Cal.4th 953, 978, abrogation on other grounds recognized in *People v. Pearson* (2013) 56 Cal.4th 393, 462.) We review any trial court ruling on admissibility of evidence for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) Of course, the scope of discretion always resides in the particular law being applied, such that we determine as a question of law whether the trial court applied an incorrect legal standard. (*People v. Parmar* (2001) 86 Cal.App.4th 781, 793.)

Defendant does not argue abuse of discretion but argues only that the trial court erred in concluding the proffered evidence was hearsay. However, defendant is wrong. The proffered evidence was hearsay.

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).)

Defendant argues a witness is not relating hearsay if the witness testifies about a fact from their own personal knowledge, and his "sisters would testify about their own experiences being raised in a family associated with organized crime, including their father and uncle having testified against John Gotti, being placed in witness protection, and the sisters' experiences of being taken by the FBI to meet their father in out-of-the-way places." He cites Evidence Code section 702: "(a) Subject to Section 801 [experts], the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter. [¶] (b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony."

However, defendant fails to show that either sister had personal knowledge of a mob connection. Defense counsel acknowledged the basis for the sisters' asserted knowledge was that their father told them so and it was in books and newspapers. This is all hearsay. The defense did not claim the sisters were in court during Gotti's trial to witness their father or uncle testifying, or that the sisters had any personal knowledge of a witness protection program. As to the proffer that the sisters would say the FBI took them to meet their father, there was no proffer that this would be anything more than hearsay as to the identity of any person as an FBI agent.

Defendant's own testimony about the mob connection was not hearsay because it was not used to prove the truth of that matter. The defense sought to use it only to show defendant's state of mind in lying low while in New York. It did not matter whether it was true; it only mattered whether he believed it to be true.

But the sisters' own beliefs as to the truth of the hearsay (assuming they held such beliefs) were irrelevant. There was no proffer that the sisters would testify they communicated such beliefs or fears to defendant, which might be relevant for a non-hearsay purpose of the effect of such messages on defendant's state of mind.

Defendant argues the prosecution would have been allowed to present testimony of his family members that he was *not* raised in a Mafia family, in order to rebut his state-of-mind evidence. (Evid. Code, § 780, subd. (i) [in determining credibility, jury may consider the "existence or nonexistence of any fact testified to by him"].) Defendant then jumps to the conclusion that "[f]or the same reason" he should be permitted to corroborate his own credibility. (Evid. Code, § 785 ["The credibility of a witness may be attacked or supported by any party, including the party calling him"].)

However, even if defendant's sisters believed their family was involved in organized crime and their relatives testified against the mob, such that the sisters harbored fear about potential retribution, such feelings would be irrelevant to defendant's credibility about his own mindset, absent evidence that the sisters communicated their own beliefs or fears to defendant.

The proffered evidence was hearsay, was not relevant or material, and was properly excluded by the trial court.

Defendant argues exclusion of his sisters' testimony, which he views as relevant and material, impaired his federal constitutional right to present a defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [90 L.Ed.2d 636].) However, a criminal defendant does not have a federal constitutional right to present unreliable hearsay or irrelevant evidence, and a state court's application of ordinary rules of evidence generally does not infringe upon the right to present a defense (*People v. Linton* (2013) 56 Cal.4th 1146, 1183; *People v. Ayala* (2000) 23 Cal.4th 225, 269.) Defendant offers no constitutional argument other than to repeat his erroneous view that the excluded evidence was relevant and material.

Since there was no error, we need not address defendant's claim that error was prejudicial.

II

Section 667.61 Multiple Victims

Defendant argues the trial court erred by imposing an indeterminate term of 15 years to life on each of nine counts for a multiple-victim "one strike" circumstance under the former version of section 667.61 in effect at the time of the offenses. Defendant thinks the statute should be interpreted as permitting only one indeterminate term per victim. Assuming the contention was preserved for appeal, we disagree.

Section 667.61, at the time in question, provided in subdivision (b), that where a defendant who does not qualify for probation is convicted in one case of offenses specified in subdivision (c) -- including forcible rape (§ 261, subd. (a)(2)) and lewd act (§ 288, subd. (a)) -- committed against more than one victim (§ 667.61, subd. (e)(5)), that defendant shall be punished by imprisonment in state prison for life and shall not be eligible for release on parole for 15 years. (Former § 667.61, subd. (b); Stats. 1997, ch. 817, § 6; Stats. 1994 (1st Ex. Sess.), ch. 14, § 1.)

Former section 667.61, subdivision (g), provided: "The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable." (Stats. 1997, ch. 817, § 6; Stats. 1994 (1st Ex. Sess.), ch. 14, § 1.)

Defendant argues the intent of former subdivision (g) was to punish predatory misconduct based on the fact of different victims, not the circumstances of a particular offense, and therefore only one one-strike term should be imposed once for each victim, regardless of how many counts were charged in this prosecution for offenses he committed against that one victim on separate occasions. Defendant acknowledges his

position is defeated by *People v. Valdez* (2011) 193 Cal.App.4th 1515 (*Valdez*), but he argues *Valdez* was wrongly decided. In his reply brief, defendant argues our opinion in *People v. Stewart* (2004) 119 Cal.App.4th 163 (*Stewart*) -- which was cited in *Valdez* -- is not "definitive authority." We reject defendant's interpretation.

In *Stewart*, *supra*, 119 Cal.App.4th 163, the defendant was convicted of three offenses committed against one victim on October 1, 2000, and two counts of lewd conduct in videotaping the same child together with her sister on a different day, September 3, 2000. (*Id*. at pp. 167-168.) The defendant contended that multiple one-strike sentences for the three October offenses was improper because those three counts involved only one victim. (*Id*. at p. 170.) We disagreed and held the multiple-victim circumstance of section 667.61 allowed one-strike sentencing for the October 1st offenses committed against the single victim that were prosecuted in the same case that involved multiple victims. (*Id*. at pp. 170-172.) "Even though there was only one victim on October 1, there were multiple victims of defendant's criminal acts and the offenses against each of those victims were tried together in the present case. The one strike law applies to all of the charged offenses." (*Id*. at p. 172.)

However, we also held in *Stewart* that only one one-strike term could be imposed for the three October offenses, because all three October offenses were committed against a single victim on a single occasion, i.e., during an uninterrupted time frame on the same day and in a single location. (*Id*., *supra*, 119 Cal.App.4th at pp. 174-175.)

People v. Jones (2001) 25 Cal.4th 98 (*Jones*) held the trial court erred in imposing three consecutive terms under former subdivision (g) of section 667.61 for three offenses against a single victim because all three offenses, which took place over a period of two hours in a car, were close enough in time and space to constitute a "single occasion." The Legislature, in enacting former subdivision (g), intended to impose no more than one one-strike sentence per victim per single occasion of sexually assaultive behavior, and

sex offenses occurred on a "single occasion" if they were committed in close temporal and spatial proximity. (*Jones, supra*, 25 Cal.4th at pp. 103-107.)

Here, none of the individual offenses could be combined into a "single occasion."

Defendant does not address *Stewart* in his opening brief but argues in his reply brief that, "to the extent the *Stewart* opinion supports the conclusion that more than one indeterminate term may be imposed for crimes against a single victim, that aspect of the statute was not the issue before this Court." Defendant fails to explain his point.

Valdez, which also involved the 1998 version of section 667.61, applied *Stewart* in a case where the defendant was convicted of seven counts of lewd acts upon a child (§ 288, subd. (a)), involving three victims. (*Valdez, supra*, 193 Cal.App.4th at pp. 1518, 1519.) Counts 1 and 2 involved one victim on two different dates. Counts 3 through 6 involved the second victim on four different dates. The final Count involved a third victim on a different date. (*Id*. at pp. 1518-1521.) The defendant in *Valdez* argued (former) section 667.61 limited application of the one-strike life term so that it could be imposed only once for each victim. (*Id*. at p. 1522.) *Valdez* rejected the argument, stating nothing in the statute "even hints at an intent to limit imposition of the . . . one strike life term, based on the multiple-victim circumstance. Rather, it evinces the intent to ensure the greatest possible punishment under that sentencing scheme. [¶] Consideration of the 1998 version of section 667.61, subdivision (g) adds nothing to defendant's argument. It provided that '[t]he term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion . . . .' [¶] The plain meaning is entirely clear. . . . 'The only limitation on the number of life sentences which can be imposed is contained in section 667.61, subdivision (g), which provides that the defendant shall be sentenced to one life term per victim per occasion no matter how many offenses listed in subdivision (c) the defendant committed against a particular victim on a particular occasion.' . . . [¶] . . . [¶] '[I]n sentencing a defendant convicted of committing violent sex offenses against

different victims on different occasions the one strike law requires the trial court to impose one indeterminate life term per victim per occasion.' Additionally, . . . 'persons convicted of sex crimes against multiple victims within the meaning of section 667.61, subdivision (e)(5), "are among the most dangerous" from a legislative standpoint.' " (*Valdez, supra*, 193 Cal.App.4th at p. 1523.)

Defendant argues we should not follow *Valdez*, because authorities cited in its discussion were not exactly on point with this case. Defendant's argument is unpersuasive.

We also observe that, while this appeal was pending, *People v. Andrade* (2015) 238 Cal.App.4th 1274, applied *Stewart* and *Valdez* in affirming a sentence of 13 consecutive terms of 15 years to life pursuant to the current version of section 667.61, rejecting the defendant's argument that he should have been sentenced at most to only five such terms on the ground there were only five victims involved in the 13 counts. (*Andrade, supra*, 238 Cal.App.4th at p. 1305.)

We conclude defendant fails to show sentencing error under section 667.61.

III

Section 290.3 Fine

The trial court imposed a $300 sex offender fine under section 290.3, as reflected in the reporter's transcript and court minutes, but failed to include it in the abstract of judgment. Defendant argues, and the People prudently concede, that the trial court erred in imposing the $300 amount authorized by the statute at the time of sentencing in 2013 (Stats. 2008, ch. 699, § 9), rather than the $200 amount authorized by the statute at the time of defendant's offenses in 1997 and 1998 (former § 290.3, Stats. 1995, ch. 91, § 121, pp. 346-348). (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1372 [fine must be determined based on law in effect at time of offense, to avoid running afoul of ban on ex post facto laws].) We accordingly order correction.

IV

Government Code Section 70373

The trial court orally pronounced a $300 assessment ($30 per Count) under Government Code section 68085.4, subdivision (c)(2). That statute deals with how certain fees should be allocated. The abstract of judgment correctly states the $300 was imposed as a criminal conviction assessment under Government Code section 70373, which imposes an assessment of $30 per felony to ensure and maintain adequate funding for court facilities. While oral pronouncement of judgment controls, an omission of a mandatory assessment may be corrected for the first time on appeal. (*People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1530.) No amendment to the abstract of judgment is necessary here, however, because the abstract of judgment notes the correct code section.

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment to include a section 290.3 sex offender fine of $200 and to forward it to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

HULL, J.

We concur:

NICHOLSON, Acting P. J.

MURRAY, J.